IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DR. SABINA BURTON,

Plaintiff,

v. Case No. 14-CV-0274

BOARD OF REGENTS UNIVERSITY OF WISCONSIN, et al.,

Defendants.

DEFENDANT'S MOTION PURSUANT TO
RULE 702 OF THE FEDERAL RULES OF EVIDENCE AND
DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC., 509 U.S. 579 (1993)

Defendant Board of Regents of the University of Wisconsin, by and through its undersigned counsel, respectfully moves the Court *in limine* as follows:

I. THIS COURT SHOULD EXCLUDE VOCATIONAL EXPERT KEVIN L. SCHUTZ FROM TESTIFYING AT TRIAL

Plaintiff case a Title IX retaliation and Title VII retaliation claim against the Board of Regents. Back in July of 2015, Plaintiff named Kevin L. Schutz, M.S., LPC as an expert witness. Mr. Schutz was named to testify regarding Burton's earning capacity yet the extent of his opinions are unclear. He indicates that Burton claims gender discrimination and exposure to retaliatory behaviors/practices since October of 2012. (Rpt. at 5.) He takes her allegations as true that she was overlooked for prestigious committee appointments and other career advancement opportunities as a result of gender discrimination and other retaliatory practices. Mr. Schutz concludes by saying that Burton is not making as much money as she should be given her resume, and seems to conclude, although it is unclear, that she is earning less than she should because of diminished access to promotional opportunities, reduced recognition, and reduced outside consulting opportunities.

Mr. Schutz, however, does not explain what promotional opportunities at Burton lost (in fact, she was granted tenure early and was promoted to associate professor at her first request). He makes several statements about the criminal justice field and academic field that neither his resume nor his report supports. His report consists entirely of conclusory statements without providing any glimpse as to what information he relied upon (other than a conversation with Burton) to reach his conclusions, what methodology he used to reach his conclusions, or whether that methodology has been peer reviewed or tested.

Furthermore, Schutz credits gender discrimination and retaliation as the reason why Burton's salary is not where it should be. Schutz never updated his report after Burton conceded her gender discrimination claim. Thus, even if Schutz's report stood up under Fed. R. Evid. 702 and 703, it is now irrelevant. Mr. Schutz is not competent to testify as an expert in this case as to liability or damages and must be excluded.

Federal Rule of Evidence 702 is well known to this court. It allows a "witness who is qualified as an expert by knowledge, skill, experience, training, or education" to provide opinion testimony if that testimony will assist the trier of fact understand the evidence. Such opinion testimony must be "based on sufficient facts or data", be the "product of reliable principles and methods" and must reliably apply "the principles and methods to the facts of the case." *Stollings v. Ryobi Tech, Inc.*, 725 F.3d 753, 765 (7th Cir. 2013). The district court must ensure proffered expert testimony satisfies Fed. R. Evid. 702's requirement, focusing "solely on principles and methodology, not on the conclusions they generate." *Id.* (quoting *Daubert*, 509 U.S. at 595).

In order to render an expert opinion, a witness must actually be an expert in the subject matter he or she intends to offer testimony. *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990). Specifically, a witness is qualified as an expert by "comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness' testimony." *Id.* at 212. Put differently, in order to qualify as an expert under Fed. R. Evid. 702, the witness's qualifications must provide sufficient foundation that the witness has actual expertise the subject matter of his or her testimony. *Gayton v. McCoy*, 593 F.3d 610, 617 (7th Cir. 2010). Courts should "consider the proposed expert's full range of experience and training in the subject area." *Id.* (citing *Smith v. Ford Motor Co.,* 215 F.3d 713, 718 (7th Cir. 2000)).

Provided a witness qualifies as an expert *vis a vis* his or her proposed testimony, courts must determine whether the proposed testimony is reliable. To do so, *Daubert* directs district courts to consider the following non-exhaustive guideposts:

> (1) whether the scientific theory can be or has been tested;
> [(2)]whether the theory has been subjected to peer review and publication; and
> (3) whether the theory has been generally accepted in the scientific community.

Gayton, 593 F.3d at 616 (citing *Daubert*, 509 U.S. at 593-94)). Courts should exclude expert testimony that does not meet these two threshold prongs of admissibility: expertise in the area of proffered testimony and reliable methodology. *Smith*, 215 F.3d at 718.

In this case, Schutz did not explain what facts he relied on, and did not properly link those facts to his opinions through acceptable methodology. *See Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir. 2007) (upholding exclusion of expert testimony regarding causation, because the expert witness did not employ reliable methods in reaching his conclusion); *Meyers*, 619 F.3d at 732. His opinion is not based on any scientific methodology and thus boils down to inadmissible speculation or *ipse dixit* of the expert. *See General Elec. v. Joiner*, 522 U.S. 136, 146 (1997) ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."); *Daubert*, 509 U.S. at 590. Mr. Schutz's report suffers from more than an "analytical gap" because he did not explain what facts or data his opinions are based on.

For these reasons, the defendant respectfully requests this court exclude Mr. Schutz from testifying in this case.

Dated this 4th day of March, 2016.

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